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Nor Azihan bt Alias v PMB Investment Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-3372–10 OF 2022
LEONG WAI HONG JC
24 FEBRUARY 2023

C *Civil Procedure — Discovery — Pre-action — Whether applicant had shown documents requested for were relevant and necessary for her to decide if she could even file suit against intended defendant for breach of contract — Whether such approach was sensible and practical as it could avoid unnecessary litigation and thereby save costs, time and resources — Whether on the facts the application for* D *pre-action discovery was neither a fishing expedition for evidence nor an abuse of process of court — Rules of Court 2012 O 24 r 7A*

The defendant was in the business of managing unit trust funds and had E appointed the plaintiff as its consultant in August 2018. In March 2021, the defendant terminated the plaintiff's appointment without giving any reason. The plaintiff contended that her termination was without basis and invalid. The plaintiff intended to sue the defendant for breach of contract and for its alleged failure to pay her full entitlements. Since the plaintiff was uncertain of F the specific amounts she had been paid by the defendant as a consultant between the years 2015 and 2021, she wrote to the defendant for documents/particulars of her earnings for those years but the defendant rejected her requests. The plaintiff then filed the instant originating summons ('OS') for pre-action discovery of 15 specific documents from the defendant. G The application was made pursuant to O 24 r 7A of the Rules of Court 2012. At the hearing of the OS, the plaintiff agreed to confine her discovery to only five of the documents after counsel for the defendant submitted that the defendant did not, or might not, have the rest of the documents requested for. Despite the plaintiff's concession, the defendant opposed the OS on the H grounds that: (a) the application was an abuse of process and that the plaintiff ought to seek discovery in the 'normal way' after filing an action; and (b) the application was unnecessary as it was actually a 'fishing expedition' for evidence.

I **Held**, allowing the OS:

(1) The defendant's contention that the plaintiff's application was an abuse of process of court had no merit. The plaintiff had clearly stated that her

intention was to file a suit for breach of contract and/or breach of the unit trust consultant agreement dated 17 August 2018 for failure to pay her full entitlements (see para 26).

(2) The five documents the plaintiff sought discovery of were clearly relevant and necessary to enable the plaintiff to decide whether she could even commence legal action against the defendant. Such an approach was sensible and practical as it could obviously avoid unnecessary litigation and save costs and prevent wastage of time and resources, which was what pre-action discovery sought to achieve (see para 27).

(3) The plaintiff's application could not be said to be a fishing expedition, especially after she had agreed to drop her prayers for discovery of the remaining ten documents. She had clearly identified the five documents that she wanted discovery of and they related specifically to the plaintiff's earnings (see paras 28–29).

[Bahasa Malaysia summary

Defendan menjalankan perniagaan menguruskan dana unit amanah dan telah melantik plaintif sebagai perundingnya pada Ogos 2018. Pada Mac 2021, defendan telah menamatkan pelantikan plaintif tanpa memberi sebarang sebab. Plaintif berpendapat bahawa penamatannya adalah tanpa asas dan tidak sah. Plaintif berhasrat untuk menyaman defendan atas pelanggaran kontrak dan atas dakwaan kegagalannya untuk membayar hak penuhnya. Memandangkan plaintif tidak pasti tentang jumlah tertentu yang telah dibayar oleh defendan sebagai perunding antara tahun 2015 dan 2021, beliau menulis kepada defendan untuk mendapatkan dokumen/butiran pendapatannya untuk tahun-tahun tersebut tetapi defendan menolak permintaannya. Plaintif kemudiannya memfailkan saman pemula semasa ('OS') untuk penzahiran pra-tindakan 15 dokumen khusus daripada defendan. Permohonan tersebut dibuat menurut A 24 k 7A Kaedah-Kaedah Mahkamah 2012. Pada perbicaraan OS, plaintif bersetuju untuk menghadkan penzahirannya kepada hanya lima daripada dokumen selepas peguamcara defendan berhujah bahawa defendan tidak, atau mungkin tidak, memiliki selebihnya dokumen diminta. Walaupun terdapat konsesi plaintif, defendan menentang OS atas alasan bahawa: (a) permohonan tersebut adalah penyalahgunaan proses dan bahawa plaintif sepatutnya memohon penzahiran dengan 'cara biasa' selepas memfailkan tindakan; dan (b) permohonan tersebut tidak wajar kerana ia sebenarnya 'ekspedisi memancing maklumat' untuk keterangan.

Diputuskan, membenarkan OS:

(1) Pendapat defendan bahawa permohonan plaintif adalah penyalahgunaan proses mahkamah tidak mempunyai merit. Plaintif telah menyatakan dengan jelas bahawa niatnya adalah untuk memfailkan saman bagi pelanggaran kontrak dan/atau pelanggaran perjanjian perunding

amanah saham bertarikh 17 Ogos 2018 kerana kegagalan membayar hak penuhnya (lihat perenggan 26).

(2) Lima dokumen yang plaintif minta untuk penzahiran adalah jelas relevan dan perlu untuk membolehkan plaintif memutuskan sama ada beliau boleh memulakan tindakan undang-undang terhadap defendan. Pendekatan sedemikian adalah wajar dan praktikal kerana ia jelas dapat mengelakkan litigasi yang tidak perlu dan menjimatkan kos serta mengelakkan pembaziran masa dan sumber, yang merupakan apa yang ingin dicapai oleh penzahiran pra-tindakan (lihat perenggan 27).

(3) Permohonan plaintif tidak boleh dikatakan sebagai ekspedisi memancing maklumat, terutamanya selepas beliau bersetuju untuk menggugurkan prayer beliau untuk penzahiran baki sepuluh dokumen. Beliau telah mengenal pasti dengan jelas lima dokumen yang beliau inginkan penzahiran dan ia berkaitan secara khusus dengan pendapatan plaintif (lihat perenggan 28–29).]

Cases referred to

Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB [2018] MLJU 697, CA (refd)

Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor [2017] 10 MLJ 213, HC (refd)

Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe [2017] 6 MLJ 363; [2017] 8 CLJ 554, CA (refd)

Norwich Pharmacal Co and others v Customs and Excise Commissioners [1973] 3 WLR 164, HL (refd)

Sharifah Sofia bt Syed Hussein (representing Hak Asasi Hidupan Liar Malaysia Global) & Ors v Pengarah Kepada Lembaga Kebajikan Haiwan [2022] 12 MLJ 37, HC (refd)

Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd [2003] 1 SLR 75, HC (refd)

Legislation referred to

Evidence Act 1950 ss 126, 127, 128, 129

Official Secrets Act 1972 ss 2, 13A, 16A

Rules of Court 2012 O 24 rr 5, 6, 7A, 7A(9), 8, 9, 13, Forms 38, 39, 40

Mohd Khairul Azam bin Abdul Aziz (with Nur Jehan bt Abu Bakar) (Azam Aziz & Co) for the plaintiff.

Abu Daud bin Abd Rahim (with Dayang Roziekah Ussin) (Azmi & Assoc) for the defendant.

Leong Wai Hong JC:

INTRODUCTION

[1] This originating summons is an application for pre-action discovery.

[2] I heard counsel on 2 February 2023 and allowed the originating summons.

[3] I allowed the originating summons after counsel for the plaintiff agreed to confine the pre-action discovery documents to only prayers 1(i) to (v) and drop the rest of her prayers after counsel for the defendant submitted that the defendant does not have or may not have the rest of the documents.

[4] Counsel for the plaintiff also took note of the submissions of the defendant that a request for such a wide range of documents amount in effect to a fishing expedition which is not allowed in law.

[5] Notwithstanding the concession by the plaintiff, the defendant had appealed to the Court of Appeal. These are my grounds of decision.

BACKGROUND FACTS

[6] The pleaded case of the plaintiff in the supporting affidavit of Nor Azihan bt Alias dated 5 October 2022 is as follows.

[7] The defendant is a management company of unit trust funds. By a unit trust consultant agreement dated 17 August 2018, the plaintiff was appointed by the defendant as a unit trust consultant.

[8] The plaintiff is a very successful consultant earning between RM50,000 to RM60,000 a month.

[9] Notwithstanding the plaintiff's immense contribution to the defendant's profits, the plaintiff's service was terminated by a letter of termination dated 2 March 2021 without any reason.

[10] The plaintiff contends that her termination was invalid and without basis.

[11] The plaintiff also contends that over the years from 2015 to 2021 she had received a total sum of RM5,393,357.12 from the defendant being her earnings as a unit trust consultant. However, the plaintiff contends that she is

unable to verify if the sums received by her as earnings are accurate due to a lack of documentation provided by the defendant (see supporting affidavit of Nor Azihan bt Alias dated 5 October 2022 at paras 20–21).

[12] In support of her allegation the plaintiff exhibited earlier requests sent to the defendant for clarifications on her earnings etc. This can be seen in the reply affidavit of Nor Azihan bt Alias dated 15 November 2022 at paras 9–10, exhs NAA4–6.

[13] The plaintiff's request for documents were rejected by the defendant.

COURT PROCEEDINGS

[14] In light of the defendant's refusal to provide the requested documents to the plaintiff, the plaintiff filed an originating summons for a pre-action discovery for the following documents, and I quote in the original Malay language:

(a) penyata bulanan pendapatan plaintif bermula Jun 2015 sehingga April 2021;

(b) penyata jualan peribadi plaintif bermula Jun 2015 sehingga April 2021;

(c) penyata jualan kumpulan plaintif bermula Jun 2015 sehingga April 2021;

(d) penyata AUM peribadi plaintif bermula Jun 2015 sehingga April 2021;

(e) penyata AUM kumpulan plaintif bermula bermula Jun 2015 sehingga April 2021;

(f) penyata jualan dan AUM setiap 'direct downline' dan 'non direct downline' kepada plaintif;

(g) senarai semua 'direct downline' plaintif dari Jun 2015 sehingga April 2021;

(h) senarai semua 'non direct downline' plaintif dari Jun 2015 sehingga April 2021;

(i) senarai 'direct downline' dan 'non direct downline' plaintif yang telah ditamatkan kontrak atau telah meletakkan jawatan dari Jun 2015 sehingga April 2021;

(j) senarai 'roll-up client' plaintif dari Jun 2015 sehingga April 2021;

(k) penyata pendapatan 'roll-up client' plaintif dari Jun 2015 sehingga April 2021;

(l) minit-minit mesyuarat defendan yang menyatakan bahawa pengagihan ('distribution') dana tidak dikira sebagai AUM kepada perunding sebelum sistem baru diperkenalkan pada April 2019;

(m) minit-minit mesyuarat defendan berkenaan penamatan perkhidmatan plaintif oleh PMB Investment dan juga MARA;

(n) 'Audited Report PMB Investment' dari tahun 2015 sehingga 2022; dan

(o) surat dan/atau sijil pencapaian plaintif dari tahun 2015 sehingga 2016.

[15] As stated earlier, the plaintiff during the hearing before me had agreed to confine the pre-action discovery documents to only prayers 1(i) to (v) and drop the rest of her prayers.

[16] The defendant opposed the originating summons on the following grounds, and I quote:

(a) the pre-action discovery application is an abuse of court process — the discovery order ought to be obtained through normal process by filing an action first; and

(b) the plaintiff's application being a 'fishing expedition' for evidence is not necessary.

A REVIEW OF THE LAW ON PRE-ACTION DISCOVERY IN MALAYSIA

Applicable rules of court

[17] O 24 r 7A, O 24 r 8 and O 24 r 13 of the Rules of Court 2012 are the applicable rules on pre-action discovery. They read as follows:

7A Discovery against other person (O 24, r 7A)

(1) *An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.*

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a Notice of Application, which shall be served on that person personally and on every party to the proceedings.

(3) An Originating Summons under paragraph (1) or a Notice of Application under paragraph (2) shall be supported by an Affidavit which shall —

(a) In the case of an Originating Summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the

order is sought is likely to be party to subsequent proceedings in Court; and

(b) In any case, *specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings* or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting Affidavit shall be served with the Originating Summons or the Notice of Application on every person on whom the Originating Summons or the Notice of Application is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

(6) An order for the discovery of documents may —

(a) Be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

(b) Require the person against whom the order is made to make an Affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and if not then in his possession, custody or power, when he parted with them and what has become of them.

(7) A person shall not be compelled by such an order to produce any document which he could not be compelled to produce —

(a) In the case of an Originating Summons under paragraph (1), if the subsequent proceedings had already been commenced; or

(b) In the case of a Notice of Application under paragraph (2), if he had been served with a subpoena to produce documents at the trial.

(8) For the purposes of rules 10 and 11, an application for an order under this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

8 Discovery to be ordered only if necessary (O 24, r 8)

On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

13 Production to be ordered only if necessary (O 24, r 13)

(1) *An order for the production of any documents for inspection* or to the Court *shall not be made* under any of the foregoing rules *unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*

(2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid. (Emphasis added.)

Relevant Malaysian case law on pre-action discovery

[18] There are two leading cases on pre-action discovery in Malaysia. Both are Court of Appeal judgments. They are *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe* [2017] 6 MLJ 363; [2017] 8 CLJ 554 (CA) ('Infoline') and the subsequent case of *Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB* [2018] MLJU 697 (CA) ('Bandar Utama Development'). In both panels sit Mary Lim JCA.

Infoline

[19] In *Infoline* Mary Lim JCA (delivering the judgment of the court) has this to say of the history of pre-action discovery and the rationale for the insertion of the new O 24 r 7A in our Rules of Court 2012:

[13] *Order 24 r 7A is new specific provision enabling discovery in two situations. In the first scenario, discovery is sought prior to the commencement of action* whereas in the second, it is sought after commencement of proceedings but against a non-party. The application for pre-action discovery is by means of an originating summons whereas in the latter, it is by means of a notice of application.

[14] *In summary, O 24 r 7A (3) requires an applicant seeking discovery of documents before action to*:

(i) state the material facts pertaining to the intended proceedings;

(ii) state whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court;

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(iii) specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and

(iv) identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power. (Emphasis added.)

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[20] In *Infoline*, Mary Lim JCA has this to say of Singapore cases which had considered their equivalent of our O 24 r 7A, which is O 24 r 6:

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[16] Given that O 24 r 7A is new provision under our Rules of Court 2012, the respondent had invited the court to consider the approach of the courts in Singapore on the operation and application of their equivalent O 24 r 7A, which is O 24 r 6. Having considered them, we are not disinclined to follow them finding the cases cited persuasive as the procedural requirements on pre-action discovery are substantially similar.

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[17] The leading authority is the Court of Appeal's decision in *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR (R) 485, a decision under the old O 24 r 7A, now amended to O 24 r 6.

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[19] Subsequently, Lai J in *Ching Mun Fong v Standard Chartered Bank* [2012] 2 SLR 22, held that a pre-action application is particularly appropriate where the applicant needs information or evidence 'to mount a claim, and not to fish for additional evidence to ground further causes of action':

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8. What then is the purpose of pre-action discovery? In *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR (R) 485 ('Kuah Kok Kim') at [31], *the Court of Appeal explained that pre-action discovery is to assist a plaintiff who 'does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer*'. The word 'viable' must not be understood to mean that the plaintiff is entitled to pre-action discovery for the purposes of augmenting his case or to 'complete his entire picture of the case'. If that was the case, the ordinary processes of general and specific discovery under O 24 rr 1 and 5 respectively would be subverted ... *Instead pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings*.

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[20] Three cases were examined by Lai J; namely *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR (R) 39 and *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR (R) 375 where the applications were refused; and *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] SLR (R) 321 where the application was allowed. In both Asia Pacific Breweries and Ng Giok Oh, the applicants already knew their causes of action and were not otherwise constrained from commencing proceedings. The applications were really to enable the applicants to assess or augment the strength of their case. In *Beckkett Pte Ltd* however, the position was somewhat different. The defendant bank (qua pledgee) had sold certain shares belonging to the applicant (qua pledgor). *The application for pre-action discovery of documents relating to the 'details of the manner of sale of the*

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pledged shares (whether by private treaty or auction)' was granted because the court found that without the information sought, the applicant would have no idea whether it had a basis to bring a claim against the defendant for failing to take reasonable steps to obtain the best price.

[21] Further, Lai J was of the view that the Rules of Court:

> ... exists to provide a systematic and orderly process for the discovery of evidence leading to trial. *The rule allowing for pre-action discovery complements this by helping potential plaintiffs to ascertain if they are in a position to commence proceedings: by virtue of the disclosed documents the potential plaintiff will be able to decide if he has a cause of action against the defendant*.

[21] In *Infoline*, Mary Lim JCA after reviewing Singapore, United Kingdom and Australian caselaw summarised the principles applicable as follows:

> [36] Considering the appeal properly under O 24 r 7A*, we are of the view that the whole intent behind* O 24 r 7A is the saving of costs, resources and time if early discovery is ordered, in fact ordered even before proceedings are commenced. If discovery reveals that the applicant's concerns are unfounded, that in this case the respondent's termination or cessation as a beneficiary is proper and in accord with the terms of the trust deed, litigation can largely be avoided. This obviously means saving of both time and costs ...
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> [37] With those considerations, what O 24 r 7A then requires from the applicant is an explanation as to why pre-action discovery and not discovery in the course of action or proceedings is necessary. *The requisites in O 24 r 7A (3) indicate that pre-action discovery is really to assist a prospective litigant plaintiff to determine whether he has a viable claim against the intended defendant ...*
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> [38] Insofar as the documents sought to be discovered are concerned, the documents must be specified or sufficiently described. All this is for practical purposes so that the order is capable of response and compliance from and by the defendant who is the appellant before us ...
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> [39] Finally, the applicant has to identify the person having possession, custody or power over the documents sought ...
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> [42] Therefore, in exercising discretion whether to grant discovery of specified or described documents in the possession, custody or power of the appellant, the respondent must satisfy the court that discovery of the same before filing of action against the appellant is indeed necessary, necessary at the particular stage of the application, and that is necessary because the order of discovery will allow for the fair disposal of the cause or matter or that it will lead to a saving of costs. *The respondent must show that the discovery is necessarily required even before an action is initiated as it is precisely to enable the respondent to decide whether he can even commence action* against the appellant in particular, to start with. And, if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order ought to be made. *Such an approach is not only fair but sensible and practical as it can obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is what pre-action*

discovery seeks to achieve. Where the court is of the opinion that the applicant is unable to satisfy these conditions, certainly the court must dismiss the application as is apparent from the terms of r 8. (Emphasis added.)

Bandar Utama Development

[22] In *Bandar Utama Development*, Hamid Sultan JCA (delivering the judgment of the court) after saying that Mary Lim JCA's judgment in *Infoline* must be read together with his judgment said the threshold test to satisfy an order for pre-action discovery under O 24 r 7A is extremely high in contrast to common law right:

> [12] Pre-action discovery is not related to contractual parties but it is addressed to third parties who may be tortfeasors, etc or parties who are necessary for the purported plaintiff to succeed in a claim or a potential party to be the defendant ... *The threshold test to satisfy an order for pre-action discovery under O 24 r 7A is extremely high in contrast to common law right*, as the rules sets out specific requirements and the court must exercise its power with caution and circumspect. It is a power which must be exercised in a genuine case and not for the purpose of annoying a third party or in cases related to fishing expedition, etc.

[23] In *Bandar Utama Development*, Hamid Sultan JCA went on to review the leading United Kingdom case which reviewed and settled the common law jurisprudence on pre-action discovery. The case was *Norwich Pharmacal Co and others v Customs and Excise Commissioners* [1973] 3 WLR 164 ('Norwich'):

> [13] The common law position for pre-action discovery was explained in great detail by House of Lords in *Norwich Pharmacal Company v Customs and Excise Commissioners* [1973] 3 WLR 164. A part of the judgment is reproduced here ... as follows:
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> > My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities ... They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortuous acts of others so as to facility their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.

[24] In *Bandar Utama Development*, Hamid Sultan JCA then summarised his understanding of *Norwich* as follows:

> [14] *In the Norwich case, the House of Lords stated that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious*

acts of others, he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a statutory duty or otherwise; and that, accordingly, prima facie the respondents were under a duty to disclose the information sought. In this case, the court held that a party could bring a specific action by writ against a person for discovery in the name of a potential defendant if that person has facilitated the wrongdoing of the potential defendant and has the necessary information. (Emphasis added.)

A summary of the law on pre-action discovery

[25] The following are the principles to be applied on pre-action discovery as distilled from O 24 r 7A, O 24 r 8 and O 24 r 13 of the Rules of Court 2012, *Norwich*, *Infoline*, *Bandar Utama Development* and case law:

(a) the burden of proof lies on the plaintiff to show that the court should exercise its discretion to grant a pre-action discovery;

(b) *in respect of a pre-action discovery for a defendant to disclose documents on the identity of the wrongdoers,* the plaintiff should show that the defendant although not the wrongdoers, has somehow got mixed up in the tortious acts of that wrongdoers so as to facilitate their wrongdoings so that he comes under a duty to assist the plaintiff who had been wronged by disclosing the identity of the wrongdoers;

(c) *in respect of a pre-action discovery for information contained in a document to be provided by a defendant* the plaintiff must show that the information is necessary *in order for him to determine if he can even commence legal action against the intended defendant.* In such cases, the pre-action discovery order ought to be made to avoid unnecessary litigation thus saving costs, preventing wastage of time and resources which is what pre-action discovery seeks to achieve;

(d) to resist disclosure, the defendant can show that the plaintiff is on a *fishing trip or fishing expedition*. In such a situation, the application will be dismissed. What amounts to a *fishing trip or fishing expedition* is vividly illustrated in this judgment of the Singapore High Court in *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75 Choo Han Teck JC and cited in *Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor* [2017] 10 MLJ 213, Wong Kian Kheong JC:

> [6] In my view, I would hold that *a 'fishing expedition'* in the context of discovery *refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a 'fishing expedition'.* (Emphasis added.)

(e) as an aside, it would not be remiss of me to say that using the act of fishing

as an analogy to illustrate what is or is not a fishing expedition has respectable provenance. A highly respected Court of Appeal judge Mahadev Shanker in his recent memoirs narrated observing Punch Coomaraswamy, at the time a Senior Partner at Braddell Brothers, rebutting his learned friend's submission that in his application for discovery he was on a fishing expedition by saying:

> My Lord, a fishing expedition is one where the applicant does not clearly know what documents he is after ... My case is not like that. I have identified the documents I require these people to disclose. Since I know where the fish are, this is not a fishing expedition.
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> (See *Summom Bonum The Ultimate Good* by Dato' Mahadev Shanker collated and edited by Santhi Latha (2021 Ed) at p 221);

(f) to resist disclosure, the defendant can also show that that there is some consideration of public policy which prevents him from making this disclosure. Consideration of public policy which can prevent him from making disclosure maybe that such disclosures would or might impair or hamper the efficient conduct of a defendant's statutory duties. And secondly such disclosure would or might be prejudicial to those whose identity would be disclosed. The court will then have to do a balancing act by examining the facts. On the whole, if a document would be discoverable in a discovery application filed once a suit is commenced, such a document should be discoverable in my view. Especially if its disclosure now is necessary in order for the plaintiff to determine if he can even commence legal action in the first place against an intended defendant. For in such cases, the pre-action discovery order ought to be made to avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is the very objective of O 24 r 7A of the Rules of Court 2012;

(g) apart from considerations of public policy that prevent disclosure, the defendant can also show that he is prevented by common law or some statute from making this disclosure. Statutory defences available are for example legal professional privilege under ss 126–129 of the Evidence Act 1950 or documents and information protected under ss 2, 13A and 16A of the Official Secrets Act 1972;

(h) when ordering pre-action discovery, a defendant is entitled to his costs of the application, unless the court orders otherwise, and of producing a copy each of the documents ordered on an indemnity basis (see O 24 r 7A(9) of the Rules of Court 2012). Thus, a defendant who sought the protection of a court order before giving pre-action discovery should be entitled to his costs of the application unless the court is of the view the defendant had unreasonably opposed the application. For practical purposes, it is useful for the court to request parties to agree on the costs

of the defendant for producing a copy each of the documents ordered. This is because O 24 r 7A(9) Rule of Court 2012 reads as follows:

> Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

ISSUES IN THIS ORIGINATING SUMMONS

The defendant's argument (1): The pre-action discovery application is an abuse of court process — the discovery order ought to be obtained through normal process by filing an action first

[26] This ground is without merits. The plaintiff had clearly stated that her intention is to file a suit for breach of contract and/or breach of the unit trust consultant agreement dated 17 August 2018 for failure to pay the plaintiff her full entitlements (see reply affidavit of Nor Azihan bt Alias dated 15 November 2022 at para 10.1).

[27] The documents sought in prayers 1(i) to (v) are clearly relevant and necessary. The pre-action discovery is necessarily required even before an action is initiated as it is precisely to enable the plaintiff to decide whether she can even commence legal action against the defendant. Such an approach is sensible and practical as it can obviously avoid unnecessary litigation thus saving costs, preventing wastage of time and resources which is what pre-action discovery seeks to achieve. See *Infoline* at [42].

The defendant's argument (2): The plaintiff's application is a 'fishing expedition'

[28] To my mind, this application by the plaintiff cannot be said to be a fishing expedition. This is so, in particular after the plaintiff agreed to drop her prayers vi to xv.

[29] The documents sought are clearly identified. They relate specifically to the earnings of the plaintiff. Applying *the trawl and drop analogy*, I am of the view that the plaintiffs' application is not a 'fishing expedition' in the context of an aimless trawling of an unlimited sea. The plaintiff knows a specific and identifiable spot into which she wishes to drop her line. The plaintiff has dropped her line. The plaintiff has clearly identified the documents she wants. Since the plaintiff knows where the fish are, this is not called a 'fishing expedition'. This is called catching fish!

[30] I therefore hold that this originating summons is not a fishing expedition.

(See *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75 Choo Han Teck JC, *Billion Prima Sdn Bhd & Anor v Nutech Co Ltd & Anor* [2017] 10 MLJ 213 Wong Kian Kheong JC and *Sharifah Sofia bt Syed Hussein (representing Hak Asasi Hidupan Liar Malaysia Global) & Ors v Pengarah Kepada Lembaga Kebajikan Haiwan* [2022] 12 MLJ 37.)

DECISION

[31] I hereby make the following orders:

(a) encl 1 prayers 1(i) to (v) are allowed;

(b) defendant to file and serve within ten days from the date of the order Form 38 (List of Documents) and Form 39 (Affidavit Verifying the List of Documents) under O 24 r 5 of the Rules of Court 2012;

(c) defendant to file and serve within ten days from the date of the order Form 40 (Notice to Inspect Documents) under O 24 r 9 Rules of Court 2012;

(d) costs of all documents requested by the plaintiff to be borne by the plaintiff on agreed charges at RM0.50 per page by consent; and

(e) defendant to pay costs of RM5,000 to plaintiff subject to allocatur.

Originating summons allowed.

Reported by Ashok Kumar